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In The

Supreme Court of the United States

October Term, 1975

No. 75-387

AZALEA DRIVE-IN THEATRE, INCORPORATED AND TWIN DRIVE-IN THEATRE, INC.,
Petitioners,

v.

EDWARD A. SARGOY, JOSEPH L. STEIN AND BURTON H. HANFT, D/B/A SARGOY, STEIN & HANFT, A PARTNERSHIP,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING THE PETITION

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October 9, 1975

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Respondents, hereafter referred to as Sargoy, oppose the petition for a writ of certiorari sought by Petitioners, hereafter referred to as Azalea, to review the judgment of the Supreme Court of Virginia in this case.

I.

QUESTIONS PRESENTED

Sargoy disagrees with the statement of the questions presented in Azalea's petition and accordingly restates them.

1. Should this Court review a determination of fact made upon contested evidence by the Circuit Court of the City of Norfolk, Virginia, and affirmed by the Supreme Court of Virginia?

2. Should this Court overturn its decision in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959) and order a state court to take cognizance of a federal antitrust defense and counterclaim to a state contract action?

3. Should this court review a determination of Virginia law—waiver of trial by jury—made by the Supreme Court of Virginia?

II.

STATEMENT OF THE CASE

A.

The Proceedings Below

This action was originally instituted by Sargoy against Azalea in the Circuit Court of the City of Norfolk, Virginia, on November 12, 1971, to recover upon a defaulted promissory note in the amount of $70,000.00 plus interest and attorneys' fees. The note was taken in compromise of a claim for film rentals due Sargoy's clients, a number of motion picture distributors, for Azalea's deliberate failure fully to report gross receipts.

Azalea pled that the note was unenforceable as a matter of state common law because it had been obtained by duress and coercion, and because it lacked consideration. Azalea also pled that the note was unenforceable because it was obtained by duress and coercion in violation of the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Antitrust Act. In addition Azalea filed an antitrust counterclaim in the state court pursuant to Section 4 of the Clayton Antitrust Act.

The trial court, relying upon this Court's decision in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959), struck the antitrust allegations as an affirmative defense and sustained a plea in abatement to the antitrust counterclaim. The trial court then heard the case without a jury on the defenses, among others, of duress and coercion and lack of consideration. Azalea fully availed itself of the ample opportunity given it by the trial court to put on all the evidence it could muster in support of its defense that it had executed the note under duress and coercion.

After a two day trial and extensive postrial briefs, the trial court in a letter opinion dated January 4, 1974, found in favor of Sargoy. The trial court said:

> Gentlemen:
>
> There is no need for the Court to state the facts, as these have been adequately stated in the comprehensive briefs filed by counsel for the parties. However, the following interesting points of law are raised by the pleadings and the evidence:
>
> 1. Was there sufficient consideration to support the contractual agreement?
>
> 2. Was there sufficient and convincing evidence of duress on the part of the plaintiffs to the detriment of the defendants?
>
> 3. Was there a binding contract between the parties?
>
> 4. Was there a counteroffer made by plaintiffs to defendants which has never been accepted by the defendant? Or was the agreement amended only to conform to the prior agreement of the parties?
>
> Counsel have cited to the Court an abundance of case law and other authorities. The Court concludes that the authorities cited by the plaintiff are more persuasive, considering the peculiar facts and circumstances of the case. In addition, it seems that to a broad degree the issues of law outlined above turn on issues of fact.

As the trier of the facts, the Court decides same in favor of the plaintiffs.

Azalea then appealed that decision to the Supreme Court of Virginia. Among Azalea's assignments of error for review by that court were:

> 7. The Court erred in refusing to permit and allow defendants to interpose and utilize as a legal defense to the Motion for Judgment the various anti-trust laws of the United States of America, generally and specifically the Sherman Anti-Trust Act and the Robinson-Patman Act, and denying the defendants the right to interpose as a defense the illegality of the acts and transactions of plaintiffs that were relied upon as a basis for their Motion for Judgment.
>
> * * *
>
> 12. The Court erred in finding that the note and offer of settlement by defendants, made on February 12, 1971, and thereafter were not made under and as a direct result of coercion and duress.

The opinion of the Supreme Court of Virginia set forth in Azalea's petition held that the trial court had correctly followed this Court's decision in *Kelly* v. *Kosuga,* above, in refusing to consider the antitrust defenses and antitrust counterclaim in a state court action to enforce a promissory note. The Supreme Court of Virginia also considered Azalea's contention that the trial court had erred in its finding of fact that the promissory note at issue had not been obtained as a result of coercion and duress. That court said, at p. 11 of Azalea's petition:

> "Defendants assigned other errors which were not urged in oral argument before us. However, we have considered the alleged errors and find no merit in any of them. Most of those alleged errors were based on

> factual issues and, since there is evidence to support the findings of the trial court, a discussion of them would serve no useful purpose [citations omitted]."

B.

The Conflicting Evidence In The Trial Court

Perhaps the one most crucial issue tried in the state court was whether Azalea had given the promissory note in issue as the result of a statement by Philip Kornfeld, an employee of Sargoy, that if the note were not given Azalea would not be furnished motion picture films by the distributor clients represented by the Sargoy law firm. The Sargoy firm did indeed represent nine motion picture distributors in their attempt to collect film rentals due them from Azalea. It is also true that Sargoy, as noteholder and attorney for its clients took the promissory note in compromise settlement of the claims for film rentals.

One reads Azalea's petition in vain to find any real suggestion that there was a contest as to whether the so-called threat was made. Azalea simply asserts that the overwhelming evidence is that the threat was made (Petition, p. 12).

Mr. Kornfeld did in fact testify, upon cross-examination, unequivocally and repeatedly that he made no such threat at all:

> "Q. All right. Now, Mr. Kornfeld, isn't it true that you told Mr. Price, in Mr. Katz's presence, that if he didn't pay an amount of money that was satisfactory to your principals or to Mr. Fallick back up in New York whom you were reporting to, he wasn't going to get any more pictures?
>
> A. That is not so.
>
> Q. You deny that?
>
> A. I do.

Q. All right, sir. That never came up?

A. No sir.

Q. You are sure?

A. I am positive.

* * *

Q. Well, before we get to that—incidentally, hadn't you threatened to accuse Mr. Price of fraud in this during this last session with them? Before he agreed to sign a note for you, didn't you bring up fraud?

A. No, sir.

Q. Didn't you tell him that the companies will contend fraud?

A. Mr. Sacks on January 15th—Mr. Sacks, you asked me a question.

Q. Right.

A. On January 15th, during the meeting then Mr. Katz said to me that the statute in this case would apply. This will be limited—limit the claim to a three years' period. And I said no, the companies will not be balked by the statute of limitations in a case like this because they will contend that there is a fraud.

This was no charge. This was saying it merely as a defense to instituting the statute of limitations.

* * *

Q. Wasn't that part and parcel of what you had told them? 'Listen. If I don't take something back to New York, you are not going to get any more film'?

A. No, sir, that is not so.

* * *

Q. Now, you tell us today that you didn't say to them, 'I have to have something to go back to New York with tonight'? You didn't say that?

A. No, sir.

Q. You remember that you didn't say that?

A. I have never said that to any exhibitor at any time.

* * *

Q. Didn't you tell him that in addition to his getting films from everybody by signing a note, you all would see that everything went back to normal with the other distributors?

A. No, sir, I never did say that.

Q. You deny that?

A. I do.

Azalea's petition is full of other errors and inaccuracies in conflict with the record. For example, Sargoy never contended, as Azalea asserts at page 5 of the petition, that Azalea owed $240,000.00 for underreported admission receipts. Sargoy originally claimed $88,000.00, ultimately compromised at $70,000.00. However, those numerous distortions and inaccuracies have been put to rest by the decision of the Supreme Court of Virginia, so they will not be answered in detail here.

III.

ARGUMENT

A.

This Court Should Not Grant A Writ Of Certiorari To Review A Finding Of Fact By A Trial Court Duly Affirmed By The Highest Court Of Record Of That State.

Azalea's petition argues that there was sufficient evidence of coercion, if the testimony of Mr. Price, Azalea's president, be believed, so that the trial court and the Supreme Court of Virginia both erred in finding that Azalea had not been coerced into executing the promissory note at issue here. As the trial court's opinion indicates, the trial court chose to believe Mr. Kornfeld's denial that he ever made any threat rather than Mr. Price's conflicting testimony. In-

deed, Mr. Price's testimony is effectively conceded to be contradictory by Azalea itself in its petition at page 13. The Supreme Court of Virginia considered that conflicting testimony and it concluded that there was sufficient evidence to support the trial court's findings.

Now Azalea invites this Court to review the evidence once again and, contrary to the trial court and the Supreme Court of Virginia, conclude that Azalea was indeed coerced into signing the note. That is an invitation this Court has consistently declined to accept, and Azalea shows no reason why it should be accepted this time.

In *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967) this court discussed its role in reviewing disputed issues of fact. It said, pp. 635, 636:

> "The petitioner asks us to reject as 'clearly erroneous' the factual conclusion about his party membership reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard the Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. [Citation omitted].
>
> * * *
>
> "The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. . . ."

That language is tailored to this case. Here two courts, the Circuit Court of the City of Norfolk and the Supreme Court of Virginia, have reviewed factual issues and have

resolved them in favor of Sargoy. Here, Judge Edward L. Ryan, Jr., of the Circuit Court of the City of Norfolk heard and observed Messrs. Price and Kornfeld on the stand and chose to believe Mr. Kornfeld that there had been no coercion. As the two-court rule had particular force in the *Berenyi* case, it has here. The writ should not be granted to review a contested issue of fact already twice resolved against Azalea.

B.

The Courts Below Properly Applied This Court's Decision In Kelly v. Kosuga.

With the fact that no coercion was applied to it established, Azalea's contention that the trial court and the Supreme Court of Virginia erred in failing to permit it to raise an antitrust counterclaim under the laws of the United States is singularly without merit.

The trial court and the Supreme Court of Virginia, relying upon the decision of this Court in *Kelly* v. *Kosuga,* 358 U.S. 516 (1959), held the defenses and counterclaim inapplicable upon the ground that only where the note itself was an antitrust violation could the antitrust defenses be made.

Kelly v. *Kosuga* involved a suit for payment of the purchase price of 50 cars of onions. The defendant there sought to defend upon the ground that the sale was made pursuant to and was an indivisible part of an agreement which violated Section 1 of the Sherman Act. This Court, in affirming the action of the trial court in striking that defense, said, at page 521:

> ". . . where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though

> it furnished the occasion for a restrictive agreement of the sort here in question."

Just as in *Kelly* v. *Kosuga* a lawful sale of onions for a fair consideration constituted an intelligible economic transaction in itself, so here the promissory note given for what both the trial court and the Virginia Supreme Court have found to be as good and valuable is the same kind of intelligible economic transaction. As such it should be accorded the same dignity and freedom from antitrust attack as was the sale in *Kelly* v. *Kosuga*.

The New York decisions cited by Azalea in its petition are not in point. The contracts there sought to be enforced contained within their very provisions a violation of the antitrust laws. By enforcing the contract the court would be aiding a violation of the laws.

Typical of those cases is *Big Top Stores, Inc.* v. *Ardsley Toy Shoppe, Ltd.*, 315 N.Y.S.2d 897 (N.Y.Sup.Ct. 1970). There the plaintiff sought to enforce a contract which contained in its terms an illegal tying arrangement. Far from being in conflict with *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), upon which both the trial court and the Supreme Court of Virginia relied, the court there distinguished the *Kelly* case by pointing out that in the *Big Top* case the court's enforcement of the contract would itself perpetrate an illegality. As the court said, at page 908:

> "Kelly v. Kosuga, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed. 2d 475 and similar cases relied on by plaintiff are readily distinguishable. They stand for the rule that a party to a contract may not avoid payment for goods sold and delivered to him on the ground that the contract of sale violates the federal antitrust statutes by provisions thereof separable from the promise to pay. In such cases the plaintiff is not required, in order to prove his case to disclose the illegality of the contract

> pursuant to which the sale was made. Here the plaintiff is asking the court to enforce the very provision of the franchise agreement which operates as an illegal restraint of trade."

None of the other cases cited by Azalea at pages 20-22 of the petition are even remotely relevant to this action. Without distinguishing them all, a typical opinion is *General Aniline and Film Corp.* v. *Bayer Co.* 305 N.Y. 479, 113 N.E.2d 844 (N.Y. 1953). All that opinion holds is that an antitrust consent decree in another action is not a bar to an action for breach of contract. The other cases cited by Azalea are even less relevant.

Kelly v. *Kosuga*, above, is not an aberration out of the mainstream of American jurisprudence. To the contrary, it logically follows this Court's holding in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947). There this Court first held that a defense that a commercial transaction violated the antitrust laws would not be permitted in a state court action based upon that transaction.

Kelly v. *Kosuga* has been consistently followed by the several Courts of Appeal since it was decided. Thus, in *El Salto, S.A.* v. *PSG Co.*, 444 F.2d 477 (9th Cir. 1971) the court ruled that a defendant could not assert a violation of the Robinson-Patman Act as a defense to a common law contract action, saying, at p. 482:

> "The Supreme Court has ruled that a Sherman Act violation is not an affirmative defense to a contract suit, even when the violation is inherent in the contract sued upon, so long as judicial enforcement of the contract would not be enforcing the precise conduct made unlawful by the Act [citations omitted]."

Certainly the mere enforcement of the promissory note here did not enforce conduct violative of the federal antitrust laws.

And the language of the court in *Medusa Corporation* v. *Gordon,* 496 F.2d 249 (6th Cir. 1974), following *Kelly,* is peculiarly applicable in this case, at p. 252:

> "If the purported oral agreement is violative of antitrust laws, an issue we do not here decide, the remedy lies in antitrust litigation under appropriate statutes, not in avoidance of a just debt."

Kelly v. *Kosuga* is, as the Virginia Supreme Court and the trial court have already determined, dispositive of Azalea's antitrust claim unless this Court is ready to re-examine the rationale which guided it in deciding *Kelly* v. *Kosuga.* We submit there is no reason for re-examining a rule well understood and consistently applied by lower courts.

C.

Azalea Was Not Improperly Denied Trial By Jury

Azalea contends it was improperly denied trial by jury even though Azalea's waiver of trial by jury was contained in the promissory note it executed. In its opinion, though, the Supreme Court of Virginia held that such waiver clauses have been upheld in a large number of cases.

Azalea also asserts that § 8.2-302(1) of the Code of Virginia (Virginia's version of the Uniform Commercial Code) authorizes a court not to enforce an unconscionable clause in a contract although otherwise enforcing the contract. Azalea insists that the jury waiver clause was such an unconscionable clause. As the Assignments of Error set out earlier show, Azalea never made that contention in the state courts and is therefore precluded from raising it now.

Even if the issue were properly before this court, though, it is without merit. The courts have consistently held that a contract clause waiving trial by jury is not unconscionable, see *David* v. *Manufacturers Hanover Trust Co.,* 298 N.Y.S. 2d 847 (N.Y.Ap. 1969), and the cases cited in that opinion.

Azalea has cited the court to only one case where a clause in a contract waiving trial by jury was found to be unconscionable as defined by the Uniform Commercial Code, *David* v. *Manufacturers Hanover Trust Co.,* 287 N.Y.S.2d 503 (N.Y. Sp. Term 1968). It was precisely that holding which was reversed on appeal in *David* v. *Manufacturers Hanover Trust Co.,* 298 N.Y.S.2d 847 (N.Y.Ap. 1969), discussed above.

What Azalea really contends is that the Supreme Court of Virginia improperly construed the Virginia constitution and common law and the Virginia version of the Uniform Commercial Code when it upheld Azalea's waiver of trial by jury. This court has pointed out from the earliest days, though, that it does not sit to review decisions of the highest state courts on matters of state law. A few cases illustrate that principle.

In *King* v. *West Virginia,* 216 U.S. 92 (1910), Mr. Justice Holmes, said, at p. 101:

> "It is argued that the state court misconstrued the statute, but we have nothing to do with that."

And in *Garner* v. *Louisiana,* 368 U.S. 157 (1961), at p. 166:

> "We of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence . . . ."

To the same effect are, for example, *United States* v. *Texas,* 314 U.S. 480 (1941), *Copperweld Steel Company* v. *Industrial Commission of Ohio,* 324 U.S. 780 (1945), *Herb* v. *Pitcairn,* 324 U.S. 117 (1945), and many others. In short, there is no reason for granting certiorari to review the decision by the Virginia Supreme Court that Azalea's jury waiver was valid under state constitutional, statutory and common law.

Azalea, attempting to find a constitutional issue to pique the curiosity of this Court, asserts that it was deprived by its waiver of a Seventh Amendment right to trial by jury in the Circuit Court of the City of Norfolk. It cites no authority for that proposition, and for good reason; all the authority is to the contrary.

This Court disposed of that contention beginning with *Walker* v. *Sauvinet,* 92 U.S. 90 (1875) at p. 92:

> "The States so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."

In *Hawkins* v. *Bleakly,* 243 U.S. 210 (1917), an Iowa Act which dispensed with trial by jury in certain actions under the Iowa workmen's compensation laws was challenged. In upholding the constitutionality of the Act, this court reiterated that trial by jury "is not embraced in the rights secured by the Fourteenh Amendment," 243 U.S. at 216, and said, at p. 217:

> "The State of Iowa, therefore, is as much at liberty as any other State to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration."

This Court similarly noted in *Minneapolis and St. Louis R.R.* v. *Bombolis,* 241 U.S. 211 (1916), at p. 217:

> ". . . that the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same."

This Court continued at p. 220:

> ". . . the limitations of the [Seventh] Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore . . . its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States."

See also *Alexander* v. *Virginia,* 413 U.S. 836 (1973), *reh. den.* 414 U.S. 881 (1973).

There is no Seventh Amendment right to trial by jury in a state court on a state cause of action. There is no basis for granting a writ of certiorari to re-examine that principle.

IV.

CONCLUSION

Both the Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Virginia have given Azalea's claims now asserted in support of a petition for writ of certiorari careful and mature consideration and have rejected them. This Court does not review contested issues of fact by writ of certiorari especially, as here, where two courts have already considered them and the trial court had the opportunity to observe the testimonial demeanor. Nor will this Court grant certiorari to review a state court's determination of state law.

Azalea's waiver of trial by jury was effective and involves no abridgment of constitutional or statutory rights. *Kelly* v. *Kosuga* is well understood and applied and should not be re-examined. Finally, it has been established for more than one hundred years that there is no Seventh Amendment right to trial by jury in a common law action in a state court.

Consequently, there is nothing left for this Court to review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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